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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**FEDERAL COMMUNICATIONS COMMISSION**  
**OFFICE OF THE SECRETARY**

In The Matter of

BellSouth Telecommunications, Inc.  
BellSouth Tariff FCC No. 1  
BellSouth Transmittal No. 476

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CC Docket No. 98-161

**REBUTTAL**

**BELLSOUTH TELECOMMUNICATIONS, INC.**

M. Robert Sutherland  
Richard M. Sbaratta

Its Attorneys

Suite 1700  
1155 Peachtree Street, N. E.  
Atlanta, Georgia 30309-3610  
(404) 249-3386

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## TABLE OF CONTENTS

I.	Introduction And Summary .....	1
II.	The Traffic At Issue Is Jurisdictionally Interstate.....	4
III.	BellSouth's ADSL Service Is Properly Tariffed In The Federal Jurisdiction .....	6
	A. The ISP's Location Is Not The Terminating Point Of Its Subscribers Communications .....	6
	B. The Interstate Nature of the Communications And The Commission's Jurisdiction Cannot Be Altered By Characterizing BellSouth's ADSL Service As A Loop Service.....	11
	C. The Connection Between An ISP And Its Subscriber Used To Originate Or Terminate Interstate Communications Constitutes An Access Service.....	13
	D. A Determination That The Communications At Issue Are Interstate Does Not Undermine The Current Access Charge Exemption Or Other Commission Policies.....	15
IV.	A Federal Tariff For ADSL Service Does Not Give Rise To A Price Squeeze .....	19
V.	Conclusion .....	22

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**REBUTTAL**

BellSouth Telecommunications, Inc. ("BellSouth") hereby submits its Rebuttal to the Oppositions/Comments filed against BellSouth's Direct Case in the above referenced proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The issues in this investigation are few and essentially turn on the question of whether communications that traverse BellSouth's ADSL service are jurisdictionally interstate.<sup>2</sup> Many of the parties opposing BellSouth's Direct Case seek to dissuade the Commission from definitively

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<sup>1</sup> Attachment A sets forth a list of the parties filing in the investigation of BellSouth's tariff, CC Docket No. 98-161, as well as parties filing in the investigations of GTE's tariff, CC Docket No. 98-79, and Pacific Bell's tariff, CC Docket No. 98-103. While this Rebuttal addresses arguments made by parties who specifically opposed BellSouth's tariff, similar arguments were also made by parties against GTE's tariff and Pacific Bell's tariff but who did not file in BellSouth's investigation. Accordingly, this Rebuttal should also be considered by the Commission in CC Docket Nos. 98-76 and 98-103.

<sup>2</sup> *In the Matter of BellSouth Telecommunications, Inc., BellSouth Tariff FCC No. 1, BellSouth Transmittal No. 476, Order Suspending Tariff and Designating Issues for Investigation*, CC Docket No. 98-161, DA 98-1734, released September 1, 1998 at para 10. This Rebuttal only addresses matters that were designated by the Commission for investigation. Some parties raise matters outside the scope of this proceeding. The large number of participants and the expedited schedule upon which the Commission is conducting this investigation precludes BellSouth from responding to such extraneous matters.

deciding the jurisdictional question presented or to limit the scope of any jurisdictional determination. In the guise of keepers of the public interest, these parties see BellSouth's filing as being motivated by a single reason—to avoid reciprocal compensation. Of course, these parties' view the public interest as coincident with their receipt of reciprocal compensation irrespective of whether the traffic is local or not.

Reciprocal compensation interests do not and cannot determine the jurisdiction of a communications service. Jurisdiction is determined by the nature of the communications on an end-to-end basis. As BellSouth demonstrated in its Direct Case, ADSL service will be used to connect an information service provider ("ISP") location with the location of an ISP's subscriber. This connection will be used by the ISP to enable its subscribers to gain access to the Internet. Internet communications are inherently interstate in nature. Even if there are some intrastate communications mixed with the interstate communications, such intrastate communications cannot be segregated from the predominantly interstate communications that take place. No party has shown otherwise. Accordingly, the nature of the communication that traverses the connection between the ISP and the ISP's subscriber is jurisdictionally interstate.

The essential concern evidenced in the majority of the oppositions surrounds the impact that a Commission pronouncement will have on the existing access charge exemption for dial-up connections and for reciprocal compensation. Indeed, it is these concerns that have many parties attempting to cordon-off any determination made here and limit its applicability only to ADSL service. As discussed further below, these concerns are premised on an incorrect belief that the access charge exemption transformed the jurisdiction of the communications over exchange facilities from interstate to intrastate. To the contrary, the access charge exemption had no

jurisdictional impact. It was merely a rate determination by the Commission. For the access charge exemption to apply, the jurisdiction of the communications must be interstate in the first instance. If the communications were not jurisdictionally interstate, the Commission would be without the jurisdictional authority to establish an access charge exemption.

The misapprehension regarding the access charge exemption has led several parties to urge the Commission to limit its jurisdictional determination and exclude dial-up connections from that determination. The legal basis for determining jurisdiction is the same regardless of the type of facilities that are used to transmit a communication. If the connection between an ISP and an ISP's subscriber is carrying interstate communications, the jurisdiction of that connection is interstate irrespective of whether the connection is a dial-up circuit switched connection or a point-to-point connection such as ADSL.

For the Commission to find that the communications at issue are jurisdictionally interstate will not undo any existing Commission policies nor would such a finding for that matter represent a change in direction by the Commission. Enhanced services that use dial-up circuit switched connections will continue to be subject to the exemption from interstate switched access charges. The effect of the Commission's determination will be to clarify, what should have been obvious, that the communications that the Commission has exempted from certain interstate charges are jurisdictionally interstate.

Nor will a Commission ruling alter reciprocal compensation obligations. Incumbent local exchange carriers ("LECs") and competitive local exchange carriers ("CLECs") have entered interconnection agreements that identify the type of traffic for which reciprocal compensation will be paid. Nothing the Commission does here can change the terms of the existing

interconnection agreements. A Commission ruling, however, will have the beneficial effect of removing the confusion that has surrounded the jurisdictional classification of Internet traffic that transits an ISP location. In this regard such a ruling would assure that reciprocal compensation is paid and received only for traffic that is in fact within the terms of an existing interconnection agreement.

The jurisdictional issue that the Commission must resolve is not new. Over forty parties are participating in the three tariff investigations that the Commission is conducting concurrently. The record is complete and the issue is ripe for resolution. The public interest and competition will be harmed unless the Commission acts conclusively and expeditiously.

## **II. THE TRAFFIC AT ISSUE IS JURISDICTIONALLY INTERSTATE**

BellSouth's ADSL service will provide a direct connection between an ISP location and the ISP's subscriber's location. The ISPs will incorporate BellSouth's ADSL service into the information services that they provide. The immediate application that will employ BellSouth's ADSL service is Internet access service. As BellSouth demonstrated in its Direct Case, Internet services inherently involve the transmission of communications that are jurisdictionally interstate.<sup>3</sup> Although Internet services themselves are enhanced services and not subject to regulation, they incorporate telecommunications services, such as BellSouth's ADSL service. The jurisdiction of the telecommunications service that is used in connection with an information service is determined by the nature of the communications that is transmitted over the service.

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<sup>3</sup> BellSouth Direct Case, 11-12.

Where, as the case is here, the underlying communications are interstate in nature, the telecommunications services involved in such communications are jurisdictionally interstate.<sup>4</sup>

A few parties concede that there are interstate uses for ADSL and that a federal tariff for such uses is appropriate.<sup>5</sup> Indeed, ACI/FirstWorld goes so far as to acknowledge that the ADSL connection between the ISP and the ISP subscriber carriers must be jurisdictionally interstate and tariffed with the Commission.<sup>6</sup> Nevertheless, many of the parties, principally CLECs, assert that the connection is an intrastate local service. These parties advance a variety of arguments to support the notion that ADSL service is or should be considered intrastate: (1) the communication between the ISP and its subscriber terminates at the ISP's location; (2) ADSL is a loop service like other telephone exchange services; (3) the connection between an ISP's subscriber and an ISP does not fall within the definition of exchange access; (4) a determination

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<sup>4</sup> *Id.* at 13-15.

<sup>5</sup> MCI WorldCom at 2; ACI/FirstWorld at 4; and Covad at 3-7. While AOL acknowledges that ADSL services may be properly tariffed with the Commission, they argue that the Commission should not claim exclusive jurisdiction over ADSL services. AOL at 3-9. Nothing in BellSouth's Direct Case suggests that there could not be a purely intrastate application developed that would employ ADSL and in such instance ADSL would be made available under intrastate tariffs. The initial use for ADSL will be to connect ISP's subscribers to the Internet. As BellSouth demonstrated in its Direct Case, Internet communications overwhelmingly are interstate communications. Even if there are intrastate communications mixed with the interstate communications, it is impossible from both a technical as well as practical standpoint to separate the intrastate components from the interstate components of an Internet communication. In these circumstances, the law is clear that the Commission has exclusive jurisdiction over such mixed communications. Accordingly, the Commission should make clear that communications over connections used for the purpose of gaining access to the Internet are exclusively interstate communications, and, thus, the Commission has exclusive jurisdiction over the telecommunications services that are used to establish the access connection.

<sup>6</sup> ACI/FirstWorld at 5-7. Covad goes further, "where it is not feasible to separate the interstate and intrastate components of a physically local telecommunications service and to apply differing Federal and State regulations to each component, the Commission may preempt all State regulation of the service." Covad at 4.

that the connection is interstate would be inconsistent with the access charge exemption and (5) federal tariffing of ADSL service could lead to an impermissible price squeeze. None can withstand scrutiny or be harmonized with existing judicial and Commission precedent.

### **III. BELLSOUTH'S ADSL SERVICE IS PROPERLY TARIFFED IN THE FEDERAL JURISDICTION**

#### **A. The ISP's Location Is Not The Terminating Point Of Its Subscribers Communications**

No credible challenge has been mounted to the legal proposition that jurisdiction is determined by the nature of the communications on an end-to-end basis.<sup>7</sup> Instead, in an attempt to craft an argument that would have the appearance of falling within the legal basis for determining jurisdiction, some parties argue that the communication terminates at the ISP location.<sup>8</sup> Their argument turns on the fact that the Commission treats ISPs as end users for access charge purposes. The end-user classification, according to these parties, makes the associated information services provided by the ISP irrelevant in determining jurisdictional end points. Essentially, these parties contend that, if two end users are involved in a communication, the Commission is precluded from looking beyond the location of the end users to determine the nature of the communications involved.

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<sup>7</sup> The key to the Commission's jurisdiction is the nature of the communications rather than the physical location of facilities. The fact that telecommunication services are provided over facilities that are located within a single state neither limits the Commission's jurisdiction nor expands the state commission's jurisdiction. The FCC has jurisdiction over and regulates the charges for the local network when it is used for the purpose of originating and terminating interstate communications. *See BellSouth's Direct Case* at 8-11.

<sup>8</sup> *See e.g.*, ALTS at 4; Hyperion at 8-9; ICG at 3-5; ITC^DeltaCom at 5-6; MediaOne at 2; and RCN at 5-6.



This argument has no merit. The law regarding the determination of jurisdiction is clear and unequivocal. The nature of the communication is determined on an end-to-end basis, looking at where the communication begins and where the communication completes. Further, as the Commission has stated, "the interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities."<sup>9</sup> In an Internet communication, the ISP is an intermediate point in the communication and acts to facilitate the end user's access to the Internet and subsequent retrieval of information from the ultimate destination point(s) of the communication.<sup>10</sup>

The fact that an ISP is treated as an end user rather than a carrier under the access charge rules does not alter the jurisdictional analysis or outcome. Other than their own wishful thinking, the proponents of this two-communications argument provide no evidence that the Commission has ever concluded that where two end-user locations within the same state are involved, the end points of the communication are the end-user locations. Indeed, to the contrary the Commission has found that interstate communications can transit through (*i.e.*, neither originate nor terminate) one end-user's location to the location of another end user. The leaky PBX circumstance exemplifies the Commission's view of jurisdiction. At the time the Commission

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<sup>9</sup> *Teleconnect v. Bell Telephone Co. of Pa.*, 10 FCC Rcd 1626 (1995) at ¶ 12 *aff'd*, *Southwestern Bell Telephone Co. v. FCC*, 116 F3d 593 (D.C. Cir. 1997).

<sup>10</sup> BellSouth pointed out in its direct case that "an ISP's subscriber typically communicates with more than one destination point on (or beyond) the Internet during a single Internet communications, and may do so either sequentially or simultaneously. For example, an ISP's subscriber in a single Internet communication may access websites that reside on servers located in various states or in foreign countries; communicate directly with another Internet user; and "chat" online, in real time, with a group of Internet users located around the corner and around (footnote continued)

was implementing the access charge rules, the Commission recognized that enhanced service providers ("ESPs") and other private line customers could "leak" interstate traffic into the exchange. As the Commission explained:

In each case the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area. At its own location the user connects the local exchange call to another service or facility over which the call is carried out of state. ... Thus, in the case in which a user connects an interstate private line to a PBX, some traffic may originate and terminate at the user location and other traffic may "leak" into the exchange in order that the calls can be completed at another location.<sup>11</sup>

In the leaky-PBX situation, the Commission considered the end-to-end traffic as jurisdictionally interstate.<sup>12</sup> Because of its jurisdiction over interstate traffic, the Commission established the special access surcharge on special access lines (private lines) that terminated in PBXs or were otherwise configured so as to be capable of leaking traffic into the local exchange. The surcharge was a mechanism used by the Commission to bring leaky PBX use within the interstate access charge plan.<sup>13</sup>

The Commission has likewise found that where two PBXs are located within the same state and are connected together by a private line, in almost all cases such private lines are

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the world. Standard Internet 'browsers' enable an ISP's subscriber to do all of these things simultaneously." BellSouth Direct Case at 14.

<sup>11</sup> *In the Matter of MTS and WATS Market Structure*, 97 FCC 2d 682, 711-12 (1983).

<sup>12</sup> It is significant to note that the end user locations in the leaky PBX situation being addressed by the Commission are in the same LATA.

<sup>13</sup> As the Commission explained, the special access surcharge was "intended for the carrier common line charges or similar charges we would otherwise impose." 97 FCC 2d at 714.

jurisdictionally interstate.<sup>14</sup> Under the jurisdictional theory advocated by some of the parties here, this jurisdictional result would be impossible. Because the two locations are end-user locations, these parties insist that the communication originates at one end-user location and terminates at the second end-user location. The fact of the matter is that jurisdiction of a service that connects two end-user locations is determined by the nature of the communications that traverses the service. In the case of the line that ties two PBXs together, the line can connect two other transmission services that extends to out-of-state points. Accordingly, in these circumstances, the tie-line is jurisdictionally interstate and the service is obtained out of the local exchange carrier's interstate access tariff.

The Commission has applied this same jurisdictional analysis with regard to services obtained by enhanced service providers. In *First Data Resources*,<sup>15</sup> First Data Resources, Inc. ("First Data") was a remote access data processing service vendor that served clients around the United States. First Data had been using intrastate intralATA 800 Service that it obtained under Pacific Bell's intrastate tariff to carry traffic from its customers in Southern California to the First Data location in the same LATA. All of the traffic that originated and terminated on this

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<sup>14</sup> *People of the State of California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), cert. denied 434 U.S. 1010 (1978). Under the *California* decision, it was sufficient that the line had the potential to handle interstate communications for the Commission's jurisdiction to attach. The Commission subsequently adopted a federal-state Joint Board recommendation that "mixed-use" special access lines would be considered jurisdictionally interstate where such lines carry at least 10 percent interstate traffic. The key fact, however, is the same under both jurisdictional rules, a service that connects two end-user locations within the same state or even the same local service area can carry interstate traffic and the service can be jurisdictionally interstate.

<sup>15</sup> *In the Matter of Petition of First Data Resources, Inc. Regarding the Availability of Feature Group B Access Service to End Users*, 1986 FCC LEXIS 3347 (CCB May 28, 1986) (*First Data Resources*).

link was routed through a concentrator in Los Angeles and carried to or from First Data's host computer in Omaha, Nebraska, over First Data's private network. The controversy arose when First Data sought to replace its intrastate intraLATA 800 service with interstate Feature Group B access service. Pacific Bell argued, much like the CLECs and state commissions are arguing here, that the Commission never intended interstate access tariff offerings to replace jurisdictionally intrastate services traditionally used to provide local connections between two intrastate customers. First Data disputed Pacific Bell's characterization of the communications as intrastate and contended that the Commission's access charge orders made clear that access services provided by the LECs and used to originate and terminate interstate communications are clear subjects of federal jurisdiction and regulation.

The Common Carrier Bureau, acting on behalf of the Commission,<sup>16</sup> determined that the connection between First Data's location in California and its California customers was interstate based on the end points of the communications--the location of First Data's customer and the location of First Data's host computer in Nebraska. The fact that all the communications transited through First Data's concentrator, which was located in the same state and same LATA as First Data's customers, did not alter the end points of the communication or the interstate nature of the communication.

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<sup>16</sup> As the Common Carrier Bureau made clear, "[b]ecause the issues before us do not present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines, the Common Carrier Bureau is resolving the First Data petition pursuant to its delegated authority." *First Data Resources* 1986 FCC LEXIS 3347 at 2. (emphasis added).

The jurisdictional analysis for connections to ISPs leads precisely to the same conclusion that the Commission has reached in connection with leaky PBXs, PBX tie-lines and in the *First Data Resources* case. The fundamental question is whether the communication that is delivered to the ISP is extended to out-of-state points. BellSouth has shown in its Direct Case where the Internet is involved, the communications are inherently interstate.<sup>17</sup> No party has shown otherwise, and several concede the interstate nature of Internet communications. Thus, the jurisdiction of the connections between ISPs' subscribers and ISPs must be deemed interstate because, on an end-to-end basis, an interstate communication occurs.<sup>18</sup>

**B. The Interstate Nature of the Communications And The Commission's Jurisdiction Cannot Be Altered By Characterizing BellSouth's ADSL Service As A Loop Service**

Some parties attempt to bypass the inescapable conclusion that a federal tariff is appropriate for an interstate service such as ADSL by characterizing ADSL as a loop service.<sup>19</sup> In so doing, these parties hold the mistaken belief that ADSL service is no different than "plain old telephone service" and accordingly should be tariffed in the intrastate jurisdiction.

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<sup>17</sup> BellSouth Direct Case, 11-12.

<sup>18</sup> Hyperion offers a bit of a twist to the two-communication argument. Like the other CLECs, Hyperion contends that a call to an ISP using ADSL goes through the end office and is delivered to the ISP, the ISP is the called party. According to Hyperion, the Commission's discussion of termination for reciprocal compensation purposes defines such traffic as local. Hyperion at 8-9. The Commission's discussion of termination did not set out a rule defining jurisdiction. Indeed, to the contrary, for reciprocal compensation to apply under the Commission's rules, the threshold jurisdictional question, *i.e.*, that the service is a local service, must first be determined. The determination of whether the service in question is local must be based on the nature of the communications involved, not on the classification of the parties involved in the communication.

<sup>19</sup> See AT&T at 3; CompTel at 1-2; ALTS at 5; and ITC^DeltaCom at 5.

At the outset, the characterization of ADSL service as a loop service is incorrect. BellSouth's ADSL service provides a point-to-point connection between two designated customer premises, an ISP and an ISP's subscriber. The ADSL customer in purchasing service from BellSouth is obtaining a transmission service between these two points that conforms to the transmission parameters set forth in the BellSouth's tariff. The technology that enables BellSouth to provide ADSL service permits an ADSL communication to be overlayed on existing facilities such as a loop to deliver the point-to-point transmission service.

Contrary to the implications of some, ADSL is not like a telephone exchange service.<sup>20</sup> Telephone exchange service, including ISDN service, provides a gateway to the public switched network and enables the customer to communicate to every other telephone subscriber connected to the public network. This is not the case with ADSL service. An ADSL customer will only be able to establish appropriate ADSL connections between points of its choosing for the carriage of interstate communications.

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<sup>20</sup> Even if ADSL were similar to a telephone exchange service, it would not alter the jurisdictional nature of the communications. Even AT&T recognizes this fact. AT&T at 3. However, AT&T is incorrect in its assumption that not all elements of telephone exchange service that are used for interstate communications are offered in interstate tariffs. The Commission's access charge plan essentially established the interstate elements of exchange facilities that are used to originate and terminate interstate communications. Thus, the access charge rules and the interstate access tariffs contain a subscriber line charge, presubscribed interexchange carrier charge and a carrier common line charge to recover interstate loop costs, a local switching charge to recover interstate switching costs and a transport charge to recover interstate trunking costs. The fact that enhanced service providers have been exempt from circuit-switched access charges does not change the fact that there are interstate elements associated with the interstate use of the exchange facilities that such enhanced service providers employ.

**C. The Connection Between An ISP And Its Subscriber Used To Originate Or Terminate Interstate Communications Constitutes An Access Service**

Several parties argue that ADSL is not an access service.<sup>21</sup> There are two variations to this argument. One argues that ADSL service does not fit the statutory definition of exchange access and the other contends that ADSL service does not meet the Commission's definition of an access service. Implicit in these arguments is that if ADSL does not fall within the definition of an access service, then ADSL must be a local service. Only ALTS clearly explains the purpose of the argument—to preserve its position on reciprocal compensation. Apparently some interconnection agreements exclude access traffic from reciprocal compensation.<sup>22</sup> Thus, ALTS tries to persuade the Commission that even if it finds the jurisdiction of the traffic to be interstate, it should declare that ADSL is not an access service.

At the outset, the question of whether or not ADSL is an access service, does not alter the jurisdictional analysis or the fact that the communications in question here and, hence the telecommunications service used to transmit such communications, are jurisdictionally interstate. The Communications Act does not limit the Commission's jurisdiction to just access services, but instead vests the Commission with jurisdiction over all interstate and foreign communications by wire and radio.<sup>23</sup>

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<sup>21</sup> See CIX at 2-3; Focal at 2; Hyperion at 3-8; ITC^DeltaCom at 3; and VSCC at 2.

<sup>22</sup> See e.g., ICG at 8-9.

<sup>23</sup> 47 U.S.C. § 152(a).

Nevertheless, ADSL is an interstate access service and properly filed in the interstate access tariff. The argument that ADSL is not an access service because it does not fall within the statutory definition of exchange access is irrelevant. Exchange access as defined in the Communications Act is a subset of the services that the Commission has deemed to be access services under Part 69 of its rules. The term "access service" has a far broader scope than the offering of access to telephone exchange service facilities for the origination and termination of telephone toll service.

Also incorrect is the claim that ADSL service does not fall within the Commission's definition of access service. Part 69 of the Commission's rules defines access service as including "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."<sup>24</sup> This definition has been in place since 1983. When the Commission adopted this definition the Commission made clear that its purpose was to develop an access charge plan that would distribute the costs of access in a "fair and reasonable manner among all users of access service, irrespective of their designation as carrier or private customer."<sup>25</sup> Among the users of access services identified by the Commission were carriers, resellers, sharers, and ESPs.<sup>26</sup> As the Commission explained, these users obtain services and facilities to complete interstate communications that transit through their location.<sup>27</sup>

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<sup>24</sup> 47 C.F.R. § 69.2(b).

<sup>25</sup> *MTS and WATS Market Structure*, 97 FCC 2d at 711.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



Thus, the history surrounding the Commission's access charge rules as well as the Commission's own explanation as to the intent of its rules demonstrate that the term "access service" encompasses a broad class of services. BellSouth's ADSL service, the purpose of which to originate and terminate interstate communications, falls within the class of services covered by the Commission's definition and, accordingly, is an access service.

**D. A Determination That The Communications At Issue Are Interstate Does Not Undermine The Current Access Charge Exemption Or Other Commission Policies**

Several CLECs seek to dissuade the Commission from determining that ADSL service involves interstate communications, believing that the access charge exemption makes all communications to and from an ISP an intrastate communication.<sup>28</sup> In the apparent view of these CLECs, if the Commission finds that the communications are jurisdictionally interstate, the Commission would be reversing course and undermining the existing ESP access charge exemption. These parties have a mistaken view of the jurisdictional impact of the access charge exemption for ESPs.<sup>29</sup>

At the outset, the access charge exemption did not transfer the jurisdiction of the communications from the FCC to the state commissions. The access charge exemption which

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<sup>28</sup> See Hyperion at 4-8; RCN at 3; and PUCO at 11.

<sup>29</sup> The mistaken assessment regarding jurisdiction is exemplified in AOL's comments. AOL argues that for jurisdictionally mixed communications the recent Eighth Circuit Court decision upholding continuation of the ESP exemption as well as the Commission's decisions establishing the exemption confirm that the Commission has reasonable discretion to regulate. AOL at 4-5. The point AOL misses is that the Commission's discretion to regulate extends only to interstate communications or jurisdictionally mixed communications that are inserverable. In both of these circumstances the Commission's jurisdiction is exclusive.

exempted ESPs from paying usage charges associated with circuit switched access services was nothing more than a rate determination. The exemption permits ESPs, albeit as a temporary transition, to obtain switched connectivity at local business line rates. This rate decision had no impact on the jurisdiction of the communications, nor could it have. Jurisdiction, as discussed in Section A above, is based on the end-to-end nature of the communication involved. The legal principles involved have been recognized by the Commission and the Courts for over fifty years, and they alone determine the jurisdictional division between the federal and state regulators. The application of these principles is not, therefore, a matter of agency discretion.

Evidently, the CLECs misapprehend the exemption and consider that the exemption mystically transforms the jurisdiction of the traffic not only to jurisdictionally intrastate traffic but to local traffic as well. None of these parties can cite to any legal basis for such a transformation.<sup>30</sup> Nor is the lack of such support particularly suprising. The simple fact is that the Commission would not have had the authority to transform the jurisdiction of the communications even if it had wanted to do so.

A variation of the argument is that even if the Commission should find ADSL connections to be jurisdictionally interstate, the Commission should make clear that such a

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<sup>30</sup> ICG refers to statements from the Commission's Access Charge Reform Order that describe the charges that an ISP pays for services it uses to originate and terminate its communications as local. ICG at 4-5. The Access Charge Reform Order confirms the fact that under the exemption, ISPs are paying intrastate business line rates rather than access rates. This confirmation, however, does nothing to alter the jurisdictional character of the communications. Indeed, if these communications were local, as ICG seems to believe, then there would be no need for an access charge exemption because the Commission would have no jurisdiction whatsoever under Section 2(b) of the Communications Act, 47 U.S.C. 152(b). The fact of the matter is that the Commission continues to have jurisdiction over the communications, and the Commission could remove the exemption at which time interstate access charges would apply.

finding does not have an impact on the jurisdiction of dial-up connections to ISPs.<sup>31</sup> For example, Time Warner acknowledges that "where a connection between an end user and ISP (a telecommunications service) is subsequently carried by the ISP on the Internet across state lines (an information service), the telecommunications and the information service components are considered inseverable for jurisdictional purposes."<sup>32</sup> Time Warner's concern is that incumbent LECs would rely on the application of these jurisdictional principles for what it terms is "an unfounded legal conclusion" that the same principles apply to switched, dial-up connections.<sup>33</sup> The ultimate fear of Time Warner is that dial-up connections would then be subject to the FCC's interstate access charge regime and not subject to reciprocal compensation. Similar concerns have led other CLEC's to argue that if the Commission finds an ADSL connection to be jurisdictionally interstate, it should limit its decision to point-to-point connections and exclude dial-up switched connections.<sup>34</sup>

This attempt to cordon-off dial-up connections not only evidences a misapprehension regarding the principles of jurisdiction but also the jurisdictional affect of the access charge exemption. The legal basis for determining jurisdiction is the same regardless of the type of facilities that are used in transmitting the communication. If the connection between an ISP and an ISP's subscriber is carrying interstate communications, the jurisdiction of that connection is interstate irrespective of whether the connection is a dial-up circuit switched connection or a

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<sup>31</sup> See Time Warner at 4-10; OPUC at 7-8; and ACI/FirstWorld at 19.

<sup>32</sup> Time-Warner at 4.

<sup>33</sup> *Id.*

<sup>34</sup> See ALTS at 16-22; AOL at 10-11; ISP/C at 11-12; RCN at 4.

point-to-point connection such as ADSL. The question of jurisdiction for dial-up connections would not even be an issue if the CLECs properly understood that the access charge exemption was not jurisdictional in nature but rather a rate application determination.

For the Commission to clarify that its jurisdiction extends to all traffic between an ISP and an ISP's subscriber that goes over the Internet because such communications are interstate in nature will not establish new policy or modify any existing policy. Switched dial-up connections will continue to be exempt from circuit switched access charges because the exemption has always applied to jurisdictionally interstate communications. Reciprocal compensation obligations are determined by the terms of the interconnection agreements that are in place. To the extent that such agreements apply to traffic that is interstate in nature, no determination made here will affect such obligations.

To be sure, however, a Commission determination that clarifies that the communications are jurisdictionally interstate would resolve an outstanding confusion that has led to significant disputes between incumbent LECs and CLECs regarding the jurisdictional nature of this traffic and whether reciprocal compensation is applicable. Nothing in such a determination would constitute a new Commission policy or indeed a change from an existing policy. To the contrary, the Commission would merely be reiterating its jurisdiction over traffic that enabled it to establish the ESP access charge exemption in the first instance.

Because no new policy is implicated in the jurisdictional question at hand, there is absolutely no substance to the arguments that the Commission should defer its jurisdictional determinations to another proceeding such as a rulemaking. In the three tariff investigations that the Commission is conducting concurrently, over forty parties ranging from state commissions,

trade associations, CLECs, ISPs, incumbent LEC's and interexchange carriers are participating. The Commission has all the information that is necessary to make a determination and nothing would be gained by conducting another proceeding.<sup>35</sup> There is a complete record, the issue is ripe for decision and the Commission should act now.

#### **IV. A FEDERAL TARIFF FOR ADSL SERVICE DOES NOT GIVE RISE TO A PRICE SQUEEZE**

Several parties echo NorthPoint's invocation of the specter of a price squeeze in order to have the Commission establish a price floor that, while protecting competitors' profits, will inevitably raise the price consumers pay for high-speed access to the Internet. The essential allegation seems to be that the retail price of BellSouth's ADSL service must exceed the cost of the unbundled elements used to provide that service, even though those same elements are used to provide a variety of other revenue producing services. In other words, that even though additional revenues and profits are available to them in the market, BellSouth should be required to underwrite a profit margin for their particular strategy.

These parties admit that in order to assess the price squeeze, the Commission would have to allocate loop and central office costs, among others, between ADSL and voice service provided using these facilities. For good reason, the Commission has already rejected starting down this long and slippery allocation slope to micro-regulation of service prices and costs. Neither is there any support in antitrust cases or competitive thinking for the singular notion

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<sup>35</sup> Indeed, the Commission has already conducted such a proceeding over a year ago when ALTS filed a letter with the Commission asking it to declare that traffic delivered to ISPs was subject to reciprocal compensation. Letter to Regina M. Keeney, Chief, Common Carrier (footnote continued)

advanced here, that anticompetitive price squeezes can be created by a firm's choosing to produce less than a full range of products with the inputs provided to it. Instead, antitrust law and competition policy dictate that competitive protections be extended only to efficient firms.

Although the price squeeze advocates would have the Commission sub-divide the local loop among various services ("functional unbundling"), the Commission has already decided that a loop is a loop, and that when a CLEC takes an unbundled loop from an ILEC, it obtains exclusive use of the entire loop facility for all services.<sup>36</sup> The Commission requires ILECs "to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide any telecommunications services that can be offered by means of the element."<sup>37</sup> The Commission specifically rejected the notion that loops be "sub-divided" between voice and "digital service, such as ISDN or ADSL."<sup>38</sup> The Commission adopted this position to foster competition.<sup>39</sup> Thus, a CLEC that takes an unbundled loop from BellSouth is entitled to the entire telecommunications revenue flow from that loop.

No doubt underlying the Commission's rejection of requests to split the local loop by

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Bureau, from Richard J. Metzger, General Counsel, and Association for Local Telecommunications Services, dated June 20, 1997.

<sup>36</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15646-15647 and 15693 (1996).

<sup>37</sup> *Id.* at 15647.

<sup>38</sup> *Id.* at 15693.

<sup>39</sup> *Id.* at 15647. ("We believe this interpretation provides new entrants with the requisite ability to use unbundled elements flexibly to respond to market forces, and thus is consistent with the procompetitive goals of the 1996 Act").

service is the difficulty and arbitrariness of the task. There is no logical distinction between ADSL service and the many other services provided over the local loop. Allocating loop costs to ADSL will only start the process. Firms wishing to provide only local service, or only long distance, or particular enhanced services such as alarm monitoring, or limited combinations, will be able to call for allocating loop costs among all these uses with equal force as the ADSL providers. Given the inherent arbitrariness of allocating joint and common costs, the end result would be a series of nonsensical price floors propping up consumer prices. The Commission's rejection of this approach in the First Report and Order makes obvious sense.

The Commission's sense to assign competing carriers full use of UNEs, such as local loops, accords with competition policy and makes the price squeeze complaints silly. The complaints are that the unbundled elements prices used to provide ADSL service exceed BellSouth's current ADSL retail price. ACI quotes from a Commission decision that a price squeeze occurs when "the input price is so high, relative to the price of the retail product, that competing providers of the retail service are unable to make a profit."<sup>40</sup> The ADSL provider-complainants here are every bit as able as BellSouth to make a profit with the inputs provided. Although they may wish to restrict their use of the local loop to a single purpose,<sup>41</sup> they are under no compulsion to refuse the additional revenues that the loop can bring them. As noted above, when a CLEC takes an unbundled loop from BellSouth, it is entitled to reap the entire telecommunications revenue stream from that loop. The total revenue stream available from the

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<sup>40</sup> ACI at 16 quoting *Ameritech Order*.

<sup>41</sup> ACI/FirstWorld at 18.

local loop, and any other UNEs involved, will generally equal or exceed the UNE costs involved.<sup>42</sup> None of the parties in this proceeding have contended otherwise.

The oddity of the ADSL providers' argument is that it reverses the whole notion of a price squeeze. Rather than a monopolist creating a price squeeze, here, the competing firms are creating the squeeze by lowering their own revenues. There is no reason for the Commission to intervene to protect the particular business strategies of these providers. The Commission need only take action concerning price squeezes where the squeeze threatens to preclude equally efficient firms.<sup>43</sup> BellSouth uses the local loop efficiently in providing both voice and ADSL over the facility. This competitive opportunity is equally available to other firms.

## **V. CONCLUSION**

For the reasons set forth above, the Commission should find that BellSouth's ADSL service is properly tariffed in the federal jurisdiction. This finding should be supported by the Commission's determination that Internet traffic is predominantly interstate in nature and that even where intrastate communications may be mixed with interstate communications there is no

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<sup>42</sup> CLECs are likely to continue to focus on cream-skimming the most profitable customers, resulting in revenues exceeding costs. Because state regulators have often set basic local service rates below cost, it may be that CLECs will not provide services, including ADSL, to some customers. This is a function of state-set retail pricing, not a BellSouth price squeeze.

<sup>43</sup> See *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945). (Alcoa's test for identifying anticompetitive price squeezes also requires that the price for the monopoly input be higher than a "fair price." Since prices for the elements sought by the ADSL complaints are set by state commissions at cost-based rates, the prices are inherently "fair" under Alcoa, and no anticompetitive price squeeze can be involved).



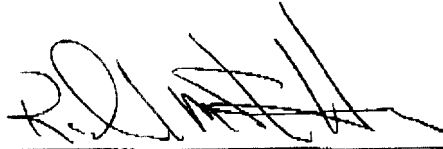
practical or technical means by which to separate the interstate and intrastate components.

Accordingly, all of the communications must be jurisdictionally interstate.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By:

A handwritten signature in black ink, appearing to read "M. Robert Sutherland", written over a horizontal line.

M. Robert Sutherland  
Richard M. Sbaratta

Its Attorneys

Suite 1700  
1155 Peachtree Street, N. E.  
Atlanta, Georgia 30309-3610  
(404) 249-3386

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